REMARKS

Status of the Claims

The present Office Action addresses claims 1, 2, 4-6, 8-12, and 14-16, however claims 4, 6, 11, and 15 are withdrawn from consideration. Remaining claims 1, 2, 5, 8-10, 12, 14, and 16 stand rejected. Applicant respectfully requests reconsideration of the pending rejections in view of the remarks herein.

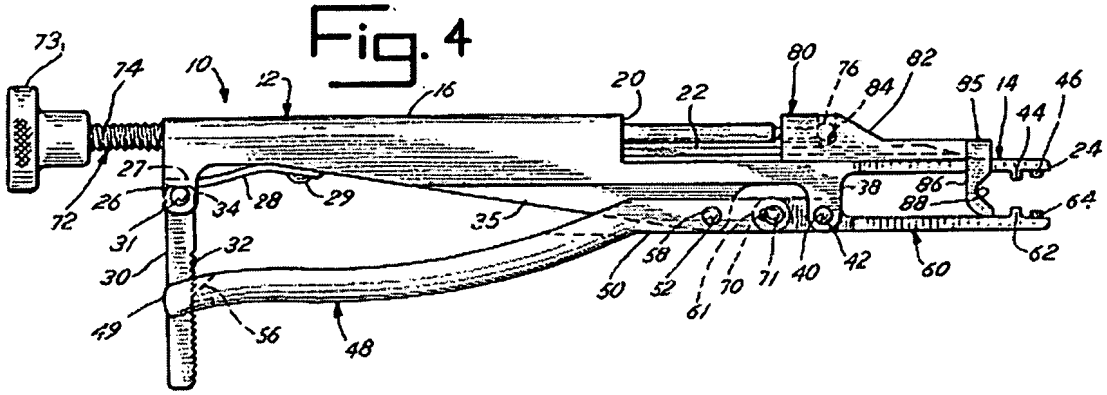
Rejections Pursuant to 35 U.S.C. §102

Claims 1, 2, 5, and 8-10 are rejected pursuant to 35 U.S.C. §102(b) as being anticipated by U.S. Patent No. 5,020,519 ("Hayes"). Applicant respectfully disagrees.

Independent claim 1 recites a spinal rod approximator system including a spinal implant having a rod-receiving member, and a spinal rod approximator. The spinal rod approximator includes an implant-gripping member having a u-shaped distal portion that extends in a direction substantially transverse to a longitudinal axis of a proximal portion of the implant-gripping member, a rod-engaging member slidably coupled to the implant-gripping member along the longitudinal axis of the proximal portion at a position proximal to the implant-gripping member, and a pusher member freely-rotatably coupled to at least one of the implant-gripping member and the rod-engaging member and threadably mated to the other one of the implant-gripping member and the rod-engaging member such that rotation of at least a portion of the pusher member is effective to move at least one of the implant-gripping member and the rod-engaging member with respect to one another. The u-shaped distal portion includes opposed legs that extend under a distal end of the rod-receiving member of the spinal implant, and the rod-engaging member has a distal portion that extends transverse to a proximal portion.

Hayes does not teach or even suggest a u-shaped distal portion that includes *opposed legs that extend under a distal end of a rod-receiving member of the spinal implant*. As shown in Figure 4, reproduced below, Hayes discloses first and second jaws 14, 60 each having two respective protrusions 44, 46, 62, 64 formed on a distal, inner surface thereof for engaging a rod-receiving head of an implant therebetween. Column 4, lines 22-27 explain that in use, the protrusion 46 on

the first jaw 14 and the protrusion 64 on the second jaw 60 are each seated *into alignment bores* of a spinal implant 2, shown in Figure 6, which is also reproduced below.



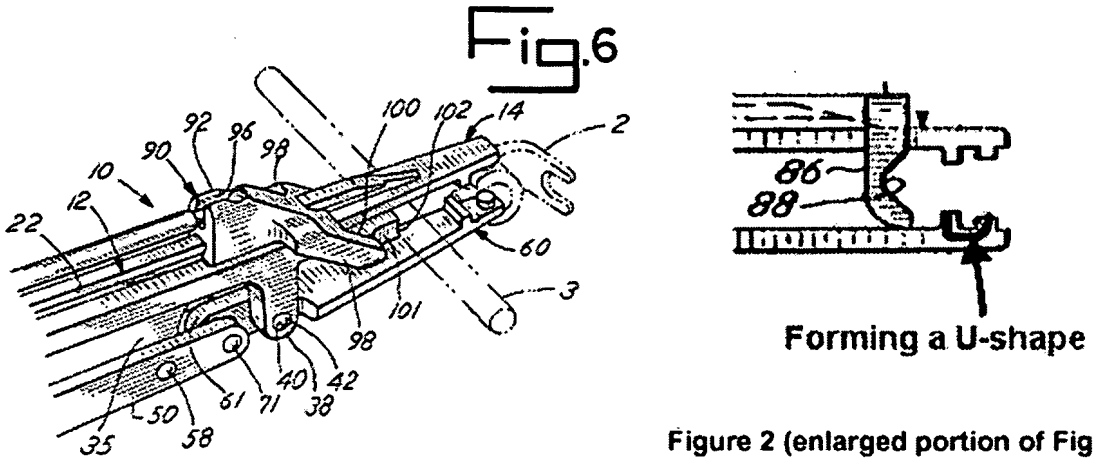


Figure 2 (enlarged portion of Figure 1)

The Examiner asserts that the protrusions 44, 46 on the first jaw 14, or alternatively that the protrusions 62, 64 on the second jaw 60, form a u-shaped distal portion as indicated in Figure 2 provided by the Examiner on page 4 of the Office Action, reproduced above. The Examiner further asserts on page 5 of the Office Action that the arrow labeled as 60 in Figure 6 of Hayes can be considered the distal end of the rod-receiving member of spinal implant 2. However, neither the protrusions 62, 64 on the first jaw 14 nor the protrusions 44, 46 on the second jaw 60 extend *under* the distal end of the rod-receiving member of spinal implant 2. The protrusions 46, 64 of the respective first and second legs 14, 60 *extend into* the implant 2 and thus cannot *extend under* the distal end of the implant's rod-receiving member regardless of what end of the implant 2 is

considered the distal end, including the Examiner's interpretation considering the arrow labeled 60 as the distal end of the rod-receiving member of the implant 2.

Furthermore, the opposed legs of Hayes identified by the Examiner are at entirely different locations with respect to the implant 2. Claim 1 recites that the *opposed legs* in plural extend under the distal end of the implant's rod-receiving portion. It is impossible for Hayes to meet that claim limitation under any reasonable interpretation because one of the opposed legs identified by the Examiner extends into the implant 2 while the other rests against an outside surface of the implant 2. At best under the Examiner's interpretation of Hayes, only one of the opposed legs of the u-shaped portion could extend under the distal end of the implant's rod-receiving portion, with the other leg necessarily at a different location with respect to the implant 2. Therefore, both of the opposed legs do not extend under the distal end of the implant's rod-receiving member regardless of what end of the implant 2 is considered the distal end.

Accordingly, independent claim 1, as well as claims 2, 5, and 8-10 which depend therefrom, distinguish over Hayes and represent allowable subject matter.

Rejections Pursuant to 35 U.S.C. §103

Claims 12, 14, and 16 are rejected pursuant to 35 U.S.C. §103(a) as being unpatentable over Hayes. Applicant respectfully disagrees.

Independent claim 12 recites a spinal rod approximator including first and second components slidably coupled to one another and adapted for relative movement along a longitudinal sliding axis, and an actuator threadably coupled to one of the first and second components and effective to move at least one of the components with respect to the other component. The first component includes an implant-gripping portion offset from the sliding axis and a u-shaped distal portion having opposed legs that are adapted to be positioned under a distal end of a rod-receiving member of a spinal implant, and the second component includes a rod-engaging portion offset from the sliding axis and being adapted to engage a spinal rod to move the spinal rod toward the rod-receiving member of the spinal implant being engaged by the implant-gripping portion. The

opposed legs of the u-shaped distal portion extend outward from the implant-gripping portion at the same axial height on the implant-gripping portion.

Hayes does not teach or suggest opposed legs of a u-shaped distal portion *extending outward from an implant-gripping portion at the same axial height on the implant-gripping portion.* It appears that the Examiner is misreading the claim language, asserting on page 4 of the Office Action that Hayes discloses the claimed invention except for the opposed legs of the u-shaped portion "hav[ing] the same axial height on the implant gripping portion." The Examiner has not made any argument addressing the claim language or refuting Applicant's position that the opposed legs of the u-shaped portion in Hayes extend outward at different axial heights on the implant-gripping portion. Accordingly, the Examiner has not established a prima facie case of obviousness.

The Examiner merely presents statements on page 4 of the Office Action related to size of the opposed legs being a design choice. Applicant does not refute the state of the law regarding a change in size being generally recognized as within the level of ordinary skill in the art. Such a change in size, however, is irrelevant to claim 12 which refers to leg positioning rather than leg dimensions. Any change in size of the u-shaped portion of Hayes would not remedy the fact that the legs 44, 46 the Examiner relies on to form the claimed u-shaped portion extend from the implant-gripping portion at different heights along the axis of the implant-gripping member 60 as both the legs 44, 46 are visible from the side, as clearly seen in Figure 4 of Hayes, rotated and reproduced below. Similarly, the legs 62, 64 are also at different axial heights on the implant-gripping member 14. In contrast, by way of non-limiting example, opposed legs 22 extend from the implant-gripping member 12 at the same axial height on the implant-gripping member 12 (in Applicant's FIG. 1, reproduced below) as only one of the opposed legs 22 is visible from the side due to the legs 22 being at the same axial height on the implant-gripping portion.

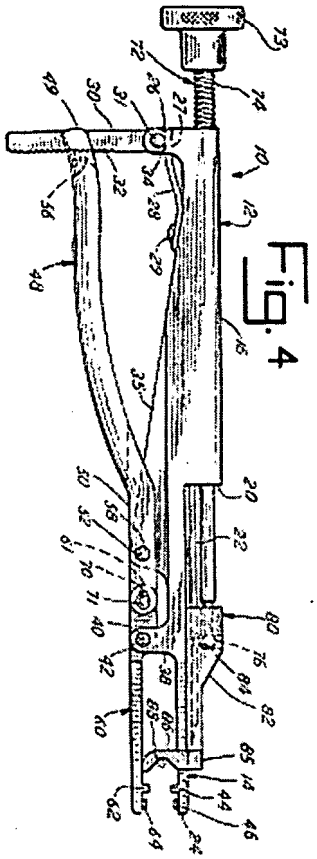
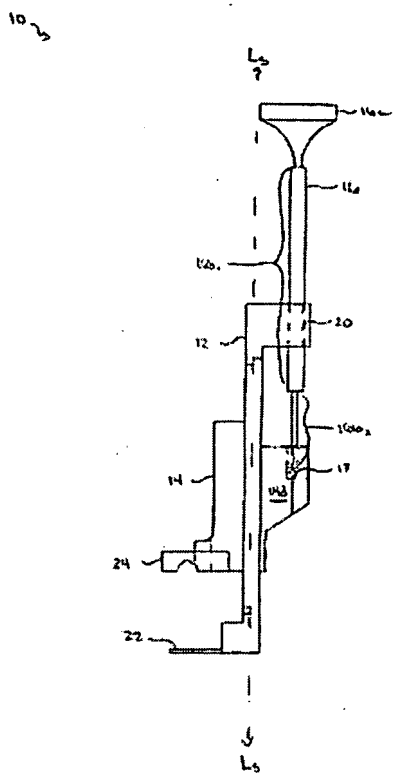


Fig. 4

Fig. 1



Accordingly, independent claim 12, as well as claims 14 and 16 which depend therefrom, distinguish over Hayes and represent allowable subject matter.

Conclusion

No extension of time is believed to be due with this filing. In the event that a petition for an extension of time is required to be submitted at this time, Applicant hereby petitions under 37 C.F.R. 1.136(a) for an extension of time for as many months as are required to ensure that the above-identified application does not become abandoned.

No fee is believed to be due with this filing. The Director is hereby authorized to charge any deficiency in the fees filed, asserted to be filed or which should have been filed herewith (or with any paper hereafter filed in this application by this firm) to our Deposit Account No. 141449, under Order No. 101896-206.

Applicant submits that all claims are in condition for allowance, and allowance thereof is respectfully requested. The Examiner is encouraged to telephone the undersigned attorney for Applicant if such communication is deemed to expedite prosecution of this application.

Dated: October 9, 2008

Respectfully submitted,

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